

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES SAN FRANCISCO BRANCH

NEVADA POWER COMPANY

And

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL  
UNION 396, AFL-CIO

Cases 28-CA-21258  
28-CA-21300  
28-CA-21327  
28-CA-21486

*Chris J. Doyle, Esq.*, for the General Counsel.

*Francis J. Morton, Esq.*, of Las Vegas, NV  
for the Charging Party.

*David C. Lonergan, Esq. & Amber M. Rogers, Esq.*  
(*Hunton & Williams*), of Dallas, TX  
for the Respondent.

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Las Vegas, Nevada on December 4 and 5, 2007, upon the Second Consolidated Complaint, as amended<sup>1</sup>, issued on September 28, 2007, by the Regional Director for Region 28.

The Second Consolidated Complaint (Complaint) alleges that Nevada Power Company (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to furnish information necessary and relevant to International Brotherhood of Electrical Workers', Local Union 396, AFL-CIO (Union) performance as collective bargaining representative, by failing to inform the Union that requested information did not exist, and by unreasonably delaying in furnishing requested information. Respondent filed a timely Answer to the Complaint stating it had committed no wrongdoing.

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<sup>1</sup> At the outset of the hearing, Counsel for the General Counsel made a motion to amend the Second Consolidated Complaint by replacing paragraph 6(c)(2)(b) with language that states: Since on or about January 25, 2007, Respondent has failed to inform the Union that the following documents did not exist: copies of any and all suspensions given to employees that were longer than one month in length; suspensions of Nevada Power Company employees that were of an indefinite nature; disciplines of the same or similar nature given to any other employees; and violations of the same or similar nature as Ms. Porter where no discipline was given to any other employees. The motion to amend was granted. Respondent denied the allegations of the Second Consolidated Complaint, as amended.

Upon the entire record herein, including the briefs from the General Counsel and Respondent, I make the following.

## Findings of Fact

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### I. Jurisdiction

Respondent admitted it is a Nevada corporation with an office and place of business located in Las Vegas, Nevada, where it is engaged as a public utility in the purchase, production, transmission, and retail sale of electricity. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$250,000 and purchased and received at its Las Vegas facility goods valued in excess of \$5,000 directly from points outside the State of Nevada.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. Labor Organization

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

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#### A. The Facts

The facts in this case are not in serious dispute. Since 1955 the Union has been recognized as the exclusive collective bargaining representative of Respondent's employees in the following appropriate unit:

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All employees employed in the customer Service, Energy Services, LGS billing, Districts, Material/Warehousing, Reprographic Services, Mail Room/Receiving Departments, Line, Fleet Services, Meter Services, Communications, Materials, Generation, Substations, and Survey Organizations, excluding all supervisory, confidential, and professional employees within the meaning of the Act.

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The Respondent and the Union have been parties to a succession of collective bargaining agreements, including the most recent which is effective from February 1, 2005 through February 1, 2008. (GC Exh. 16) This agreement at Article 8 provides for a grievance procedure.

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#### B. The Jodi Patterson Grievance

##### 1. The Facts

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Respondent discharged customer service representative Jodi Patterson (Patterson) on January 11, 2006, effective March 10, 2006, (GC Exh. 34) because she falsified a Nevada Power Letter of Credit. The Union filed a grievance on Patterson's behalf on March 15, 2006. (GC Exh. 35) On November 15, 2006, the Union filed an information request with Respondent concerning the Patterson grievance. (GC Exh. 12) At the hearing Respondent stipulated that of the 12 items requested by the Union items 1, 3 and 6-12 were necessary and relevant. Item 4 requested copies of training records given to Patterson regarding school verification forms used

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up to March 10, 2006. Item 5 requested copies of any training guides or material used for teaching Patterson the do's and don'ts of state bill 47.

Respondent failed to respond to the Union's November 15, 2006 information request until April 6, 2007. (GC Exh. 13) In its response, Respondent noted it had previously provided 150 pages of information on May 22, 2006 at the fourth step grievance meeting. In addition Respondent listed 23 items provided in response to the Union's November 15, 2006 information request. On April 12, 2007, (GC Exh. 14) the Union requested information regarding item 9 of its November 15 information request, copies of disciplines of the same or similar nature given to any other employee. The Union noted employee Kimmie Webb as an employee disciplined for similar conduct. On April 15, 2007, (GC Exh. 15) one day before the Patterson arbitration, Respondent provided information responsive to the Union's April 12, 2007 information request. Respondent failed to provide information until April 2007 because it forgot about the request.

## 2. The Analysis

Counsel for the General Counsel contends that Respondent unreasonably delayed in furnishing the information requested by the Union on November 15, 2006 until April 6 and April 12, 2007. Respondent admits that it was tardy in providing the requested information but that because Respondent inadvertently forgot about the information request and because once the request was found on March 15, 2007, it provided the documents, Respondent did not act in bad faith.

The governing principles in deciding whether an employer is required to furnish a union with information are well established. The general rule is that an employer has a statutory obligation to supply requested relevant information, which is reasonably necessary to the exclusive collective-bargaining representative's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). These "responsibilities" include the administration of the contract and the processing and evaluating of grievances. *Clinchfield Coal Co.*, 275 NLRB 1384 (1985). Whether information is relevant or not is determined by the probability that the desired information would be of use to the union in carrying out its statutory duties and responsibilities. The standard for determining whether information is relevant is a liberal one much akin to that applied in discovery proceedings, and a party must disclose information that has any bearing on the subject matter of a particular case *Leland Stanford Jr. university*, 262 NLRB 136, 139 (1982).

I find that all of the information the Union requested was necessary and relevant to its processing and evaluating the Patterson grievance. Items 4 and 5 of the request were relevant as they could have established mitigating factors in assessing the severity of any discipline Patterson should have received.

In *West Penn Power Co.*, 339 NLRB 585, 587 (2003) the Board found the employer's four month delay in providing requested documents violated Section 8(a)(1) and (5) of the Act. The Board found that under the circumstances of that case, the employer's delay was unreasonable. In *West Penn Power* at 587 the Board set forth the test for determining if a delay in furnishing information violates the Act:

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062, fn. 9 (1993).

In evaluating the promptness of the response, “the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information.” *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

Here, unlike the cases cited by Respondent, the Union was not in fact in possession of the information requested in the Patterson grievance. While Respondent inadvertently misplaced the Union’s request for information, such negligence cannot be characterized as a “reasonable good faith effort to respond” promptly. *West Penn Power Co.*, *supra*. . Once the information request was made, Respondent cannot shift the burden for production of the information to the Union by suggesting that the Union was under some obligation to remind Respondent to produce the information. In *Regency Service Carts, Inc.*, 345 NLRB No. 44 slip op. at page 4 (2005), the Board found a 16 week delay in furnishing information unreasonable. The Board has found delays of 14 weeks, *Pan American Grain*, 343 NLRB No. 47 (2004), nine weeks, *Bundy Corp.*, 292 NLRB 671 (1989) and seven weeks, *Woodland Clinic*, 331 NLRB 735, 737 (2000) unreasonable. The passage of almost five months from the time of the information request is an unreasonable period under all of the circumstances. I find in delaying the production of the requested information in the Patterson grievance, Respondent violated Section 8(a)(1) and (5) of the Act.

## C. The Joseph Smith Grievance

### 1. The Facts

On May 10, 2006, Respondent suspended field service representative Joseph Smith (Smith) and on May 26, 2006, Respondent discharged him for dishonesty in that he improperly entered the home of Respondent’s customer. (GC Exh. 32) On May 11, 2006, the Union filed a grievance concerning the Smith suspension. (GC Exh. 33) On July 6, 2007, and July 11, 2007, the Union made information requests for 16 and 1 item respectively concerning the Smith grievance. (GC Exhs. 18, 20) On July 17, 2007, Respondent replied that it had previously provided all responsive information including the George Dorsey and Associates LLC (Dorsey) investigation into Smith’s case and that it was contacting Dorsey to see if he had any further responsive information. (GC Exh. 21) On July 18, 2007, the Union renewed its July 6 information request and added items 17 and 18 that requested respectively drawings made by Dorsey in the Smith investigation and copies of all video recordings, tape recordings, or CD/DVD recordings taken by Dorsey in the Smith investigation. (GC Exh. 22) On July 19, 2007, Respondent furnished a copy of a security log and indicated it had no further information responsive to the Union’s requests other than what had already been provided but that it had recently learned that Dorsey, the outside investigator in the Smith case, had audio recordings from his investigation. (GC Exh. 23) Respondent received the Dorsey tapes on July 23, 2007 and after making copies gave them to the Union at 2:00 p.m. on July 23, 2007. On July 23, 2007 the Union filed unfair labor practice charges in case 28-CA-21486 against Respondent alleging Respondent delayed and refused to furnish information requested by the Union relevant to the processing of grievances. No further charges were filed.

The Smith arbitration was scheduled for July 24, 2007. After the arbitration opened, the arbitrator continued the hearing to give the Union time to review the recordings. The hearing was rescheduled for May 2008. On July 31, 2007, the Union made another 15 item information request in the Smith grievance. Item 2 through 10 (GC Exh. 24) sought the following information:

2. Any and all records, memos, notes, pictures, documents, or videos pertaining to 3004 Country Dancer for 1/1/2005 to 5/1/2006 including but not limited to meter sets, meter reads, initiation of service from Centex Homes into Mr. and Mrs. Wells' names.
- 5 3. Any and all records, memos, notes, pictures, documents, or videos reflecting any work performed by Joe L. Smith pertaining to Awakening Street from 1/1/2005 to 5/1/2006 including but not limited to meter sets, meter reads, transfer of services and re-reads.
- 10 4. Any and all disciplines given to any Nevada Power Company employee from 4/14/96 to present for dishonesty to a customer of Nevada Power Company.
- 5 5. Any and all disciplines given to any Nevada Power Company employee from 4/14/96 to present for dishonesty to a Nevada Power Company supervisor.
- 15 6. Any and all disciplines given to any Nevada Power Company employee from 4/14/96 to present for dishonesty for entering a structure, building, or home (residential or commercial).
- 20 7. Any and all notes, memos, handwritten or typed, incident reports, records, or coaching reports involving the above mentioned for which no discipline was given by Nevada Power Company.
- 25 8. Any and all writings, memos, work rules, documented meetings, and sign in sheets, policies, procedures, or training pertaining to entry by a Nevada Power Company employee for going into or entering structure, building, or home (residential or commercial).
- 30 9. Any and all training records, training acknowledgements, sign in sheets for Joe L. Smith.
- 35 10. Any and all other investigations by Nevada Power Company or outside agencies hired by Nevada Power Company other than Joe L. Smith where an employee was tape recorded from 4/16/96 to present.

On August 24, 2007, Respondent told the Union that it would not provide information concerning items 2 through 10. Respondent took the position that items 2 and 3 were "not limited to a relevant or reasonable subject matter or temporal scope . . . seeks disclosure of the Company's trade secrets and or confidential business information;" that items 4, 5, 6 and 7 were irrelevant to issues pending in the grievance procedure, were not limited to bargaining unit employees, and that Respondent did not have a system to search for the requested records; that item 7 sought material protected by the attorney-client, attorney work product and investigative privileges; that items 8 and 9 were not limited to a relevant or reasonable subject matter or temporal scope, were overly broad and irrelevant; that item 10 was overly broad and irrelevant.

The instant Complaint issued on September 28, 2007, adding allegations concerning Respondent's failure to furnish information responsive to the Union's July 31, 2007 information request.

## 2. The Analysis

Counsel for the General Counsel argues that Respondent, in failing to provide the Union with items 2-10 in the July 31, 2007 information request in the Smith grievance, violated Section 8(a)(1) and (5) of the Act. Respondent contends that the Union's July 31, 2007 information request amounts to pre-trial discovery, that after an unfair labor practice charge has been filed or a complaint has issued, it has no obligation to furnish information, that there is no underlying charge to support the new allegations in the Complaint and that it did not refuse to furnish the requested information.

In *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 (1998), the Board held there was no violation of Section 8(b)(3) of the Act with respect to the CNA's refusal to provide names of witnesses it intended to call in an arbitration. The Board said that there was no right to pretrial discovery.

In this case there is no question that the July 31, 2007 information request was made after the start of the July 24 arbitration hearing in the Smith case. Even assuming that a portion of the July 31 information request was based on a pre-arbitration discovery of audio tapes, it is apparent that the case had been scheduled for arbitration long before the discovery of the tapes. Accordingly, Respondent was under no obligation to furnish information once the case was scheduled for arbitration.

In addition the Board's procedures do not provide for pre-hearing discovery. Thus, the Board has held where there is a pending 8(a)(5) charge alleging refusal to provide information, the Board will not find that refusal violates Section 8(a)(5). In *Union-Tribune-Publishing Co.*, 307 NLRB 25, 26 (1992) the Board has said:

Any other rule would, in effect, impose a discovery requirement where none otherwise exists. See, e.g., *WXON-TV*, 289 NLRB 615, 617, 618 (1988). Although there is no 8(a)(5) allegation here, we find that the same considerations apply in this case as in the 8(a)(5) context. Thus, the usual rule is that an employer faced with a pending 8(a)(3) charge may legitimately decline to furnish information that may relate to the charge prior to the hearing.

Here a charge was pending case 28-CA-21486 at the time the Union made its information request in the Smith case on July 31, 2007. Respondent was under no obligation to furnish information that related to the information request of July 31 that led to the allegations in the Complaint herein at paragraph 6(a)(4).

Accordingly I will recommend that this allegation be dismissed. Having resolved this allegation, I need not consider Respondent's other arguments.

## D. The Audra Porter Grievance

### 1. The Facts

On September 30, 2006, Respondent suspended field service representative Audra Porter (Porter) for setting her own power meter. (CP Exh. 2) On November 2, 2006, the Union filed a grievance over Porter's suspension (GC Exh. 36) and on November 20, 2006 made an information request of Respondent concerning Porter's grievance. (GC Exh. 2) Respondent stipulated that of the 11 items requested, items 1 through 4, 9 and 10 were necessary and relevant to the Union as Porter's representative in the grievance process. Items 5 through 7 and 11 sought the following information:

5. Copies of any and all suspensions given to employees that were longer than one month in length.

6. Copies of any and all suspensions of Nevada Power Company employees that were of an indefinite nature.

7. Any and all copies of disciplines of the same or a similar nature given to any other employees.

11. Any and all copies of violations of the same or a similar nature as Ms. Porter where no discipline was given to any other employees.

On January 13, 2007, Respondent provided information responsive to items 1 through 4, and 8 through 10 of the Union's November 20, 2006 request. Respondent refused to provide information as to items 5 through 7 or 11. (GC Exh. 3) Respondent stated that items 5, 6 and 7 were limitless in nature and not limited to bargaining unit employees and that Respondent had no system to track the requested records. In response, on January 25, 2007, the Union renewed its demand for information pertaining to items 5 through 7 and 11. (GC Exh. 4) On January 30, 2007, Respondent again refused to provide the information requested on the ground that the requests were indiscriminate and did not permit Respondent to make a meaningful review of its records. (GC Exh. 5) On February 27, 2007, the Union again demanded information concerning items 5 through 7 and 11. (GC Exh. 8) On March 1, 2007, Respondent stated that it was not aware of any documents responsive to items 5 through 7 and 11. (GC Exh. 9) Respondent has not explicitly stated that such items do not exist. At the hearing, Counsel for the General Counsel stated that the only information Respondent failed to advise the Union did not exist as a result of the various information requests in the Porter case was copies of suspensions given to employees greater than one month in length, indefinite suspensions of employees, and similar discipline of employees where no discipline was given.

### 2. The Porter Grievance Settlement

On May 31, 2007, during the course of the Porter arbitration hearing, the Union, Respondent and Porter reached a settlement regarding Porter's grievance. As part of the settlement, the Union agreed to withdraw all unfair labor practice charges in case 28-CA-21258 related to the Union's information requests in the Porter grievance. (GC Exh. 10 at 588) For its part of the settlement Respondent agreed to reinstate Porter, pay her \$21,000 backpay and enter into a Last Chance Agreement with Porter. Respondent accomplished all of its obligations and the Union requested withdrawal of the charges within five days of the settlement.

On May 31, 2007, the Regional Director for Region 28 issued a Complaint against Nevada Power Company, Cases 28-CA-21258, 28-CA-21300 and 28-CA-21327 alleging, inter alia, that Respondent had refused to provide information requested by the Union on November 20, 2006 and January 25, 2007 that related to the Porter grievance. (GC Exh. 1(g)) In addition the Complaint alleged Respondent had refused to provide information the Union had requested on November 15, 2006, related to the Patterson grievance and information the Union had requested on March 27, 2007 related to the contracting out grievance.

On June 1 or June 4, 2007, Union Business manager Charles Randall (Randall) met with Board Agent Cheryl Chambers (Chambers). Randall told Chambers that the Porter arbitration had resulted in a settlement agreement and that the Union was withdrawing the unfair labor practice charges dealing with the information requests in the Porter case. Chambers said she would have to consult with her supervisor. Two hours later Chambers called Randall and said that the Region would not permit withdrawal of the Porter unfair labor practice charge because the Region believed there was a pattern of delay in Respondent's refusal to provide information. During a July 2007 settlement conference with ALJ Schmidt the Union again attempted to withdraw the Porter unfair labor practice charge. Shortly thereafter, the Union sent the Porter settlement agreement to Region 28 and after reviewing the settlement Field Attorney Chris Doyle advised Randall that the charge could not be withdrawn because of a pattern of delay by Respondent in furnishing information. Later on September 28, 2007 the Second Consolidated Complaint was issued by the Regional Director for Region 28.

At the hearing in this case Respondent filed a motion to dismiss all claims related to Audra Porter. (R Exh. 1) The motion was taken under submission. Respondent contends that the parties' settlement of the Porter grievance during arbitration should have been applied, resulting in the dismissal of the Porter unfair labor practice charges.

### 3. The Analysis

Counsel for the General Counsel contends that Respondent violated Section 8(a)(5) of the Act by failing to provide the information requested on November 20, 2006 in the Porter grievance until January 25, 2007 and failed to advise the Union since January 25, 2007 that certain information did not exist. Counsel for the General Counsel also urges that the Porter settlement be rejected under the *Independent Stave Co.*, 287 NLRB 740 (1987) and *Teamsters Local 115 (Gross Metal)*, 275 NLRB 1547 (1985) line of cases since Respondent showed a pattern of refusing or delaying in furnishing information.

Respondent argues that the charges in the Porter case should be dismissed under the Board's deferral policy in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), *Olin Corp.*, 268 NLRB 573 (1984), *Alpha Beta Co.*, 273 NLRB 1546 (1985), and *United States Postal Service*, 300 NLRB 196 (1990) since a settlement among all parties was reached in the grievance arbitration procedure. Respondent also takes the position that it supplied the requested information to the Union and advised the Union no other information existed.

In *Alpha Beta Co.*, *supra* at 1547 the Board set forth the test for applying the *Spielberg* and *Olin* principles to a settlement agreement reached in the grievance arbitration procedure. The Board will consider if the grievance procedure is fair and regular, if the parties agree to be bound by the agreement, and if the agreement is clearly repugnant to the principles and policies of the Act.

In *Postal Service*, *supra* at 198, the Board added a fourth criteria in arbitral settlement cases, did the parties consider the unfair labor practice issues. The Board held, "This criterion

is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice.” The party who would have the Board reject the settlement bears the burden of showing that the *Olin* standards have not been met. *Postal Service, supra* at 198.

*Independent Stave* and *Teamsters Local 115* apply to the consideration of non-Board settlements not deferral to the grievance-arbitration procedure under *Spielberg* and *Olin*. In *Independent Stave Co., supra*, the Board considered the public interest in acceptance of a non-Board settlement providing for reinstatement, about ten percent of the backpay sought and no notice posting. Counsel for the General Counsel opposed acceptance of the settlement since it did not fully remedy the alleged unfair labor practices.

The Board held that when confronted with alleged violations of the Act, such allegations must be evaluated for settlement purposes in light of the uncertainties of litigation. Under these circumstances not every allegation must be remedied in order to vindicate statutory rights because of the public interest in achieving settlement without litigation. Therefore, the Board held that it would consider all surrounding circumstances and evaluate settlements under four criteria:

- (1) Whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. *Id.* 287 NLRB at 743.

In *Teamsters Local 115* at 1547, the Board agreed with the ALJ who rejected a settlement agreement in a picket line violence case where there was a history of prior picket line misconduct and three other pending proceedings against the Respondent union. The ALJ rejected the settlement agreement that contained a non admission clause, a narrow order, and a provision precluding reliance on the case as a precedent in pending cases as making a mockery of law enforcement.

In the instant case, I am guided by the *Spielberg* and *Olin* principles rather than the *Independent Stave* guidelines since this case arises in the grievance-arbitration context as opposed to a non-Board settlement, although there is considerable intersection in the principles in both lines of cases.

Here there is no evidence that the grievance-arbitration procedure was other than fair and regular. All parties, including Porter, were bound to the terms of the settlement. In determining if the settlement was clearly repugnant to the purposes and policies of the Act, I am guided by whether the settlement is palpably wrong under the law, i.e., did it impinge on the parties' rights under the Act. The settlement vindicated the rights of Porter as she was reinstated with backpay. The Union for its part of the settlement agreed to withdraw the unfair labor practice charges dealing with the refusal and delay in furnishing information. Respondent had furnished considerable information. The only outstanding information in issue was limited in nature and Respondent had stated it was unaware of such disciplinary records, although a full search was not conducted. Once the Union agreed to the Porter settlement, the information requests were moot and the Union agreed to waive its rights to the limited information that

Respondent had not furnished. Moreover, the Porter settlement in no way impinged on the Union's right under the Act to seek redress before the Board in the Patterson, Smith and contracting out information requests. As to Counsel for the General Counsel's contention that there was a pattern of conduct that warrants rejection of the Porter grievance, I note here that in the Patterson grievance there is no dispute that Respondent delayed in furnishing the information due to inadvertent error. In the Smith grievance Respondent was under no obligation to furnish the requested information and in the contracting out grievance Respondent failed to produce the requested information. I find no pattern or practice of delay or refusal to furnish information in two isolated and discrete grievances. The final consideration is whether the unfair labor practice issue was considered by the parties. The Union's right to information was obviously considered by the parties in the Porter settlement. The Union agreed, as part of the settlement, to withdraw the charges alleging violation of Section 8(a)(5) of the Act in conjunction with the Porter grievance information request.

I will recommend that the Board defer to the Porter settlement concerning the Complaint allegations that Respondent delayed in furnishing information and failed to advise the Union that requested information did not exist. I recommend that those portions of the Complaint be dismissed.

#### E. The Contracting Out Grievance

##### 1. The Facts

On March 20, 2007, Union Business Manager Charles Randall (Randall) met with Respondent's Call Center Manager, Schad Koon, Respondent's sister company Sierra Pacific Power Company's Human Resources Director Ralph Dick (Dick) and Sierra Pacific Power Company's Vice President of Customer Service, Carol Martin (Martin).

Martin advised Randall that Respondent planned to contract out bargaining unit work performed by 100 call center employees to an outside contractor from Portland, Oregon. The period of contracting out the work was for from three to six months from May to October when Respondent received its highest number of calls. Respondent contended that it had the authority to contract out the work under Article 4.3 of the collective bargaining agreement and that the decision to contract out was final. Article 4.3 provides: (GC Exh. 16 at 63)

##### CONTRACTING WORK:

In case the Company should contract any type of work customarily performed by bargaining unit employees, the Company shall, before awarding such contract, advise the contractor that the work is to be done under not less than the terms and conditions pertaining to hours and wages set forth in this Agreement. Upon award of such contract, the Company shall notify the Union in writing within thirty (30) days of any and all contracts awarded of such contractor and the nature of the work being performed.

After this meeting the Union filed a grievance concerning the subcontracting and on March 27, 2007 filed an information request, seeking nine items. (GC Exh. 17) The Union sought the following information:

1. Any and all documents, studies, reports and any other items upon which the company based their decision to send work out of state.

2. Any and all documents upon which the company based its claim that they have the right to send any work out of state.

3. Any and all documents, contracts and records regarding any and all times Nevada Power Company sent work out of state.

4. Any and all copies of the contracts with companies that Nevada Power Co. is or intends to contract work out of state with showing proof that all work must adhere to the current collective bargaining agreement regarding hours and wages.

5. Copies of any and all surveys that were given to employees with regard to their concerns on management of work loads.

6. Copies of any and all documents, contracts or records that shows Nevada Power Co. has used or is currently using companies outside the State of Nevada to do bargaining unit work.

7. Copies of any and all records reflecting the work load of employees that would be affected if work was sent out of state from 5/1-10/31 each year for the last five years. Number of calls handled wait times etc.

8. Any and all records, forecasts, studies, and documents reflecting time, number and nature of anticipated calls for 5/1/07-10/31/07 and the same period for each successive year thereafter for which Nevada Power Co. anticipates contracting out the work in question.

9. Any and all copies of the two county bond regulations that Nevada Power Company must adhere to.

In April 2007 Dick advised the Union that it would furnish no information concerning the subcontracting grievance on the ground that the collective bargaining agreement gave Respondent the right to subcontract.

## 2. The Analysis

Counsel for the General Counsel takes the position that despite the subcontracting language in the collective bargaining agreement, Respondent had an obligation to bargain with the Union over both the decision and the effects of the decision to subcontract. This made the Union's information request both relevant and necessary. Respondent contends that under the subcontracting provision in the contract, the Union waived its right to bargain about the decision to subcontract. Therefore, the information request, which deals with information concerning the Respondent's decision, is irrelevant.

It is well settled that a union does not waive its statutory bargaining rights unless it has done so in a manner that is both clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In evaluating whether there has been a clear and unmistakable waiver, both the Board and courts look to the precise wording of the relevant contract provisions to determine if the waiver is clear and unmistakable. *Enloe Medical Center*, 343 NLRB 470, 474 (2004) enfd. denied 433 F.3d 834 (D.C. Cir. 2005). When an employer contends that the provisions of a collective-bargaining agreement show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must establish that the parties fully discussed the issue and that the union clearly and unmistakably

waived its interest in the matter. *Trojan Yacht*, 319 NLRB 741, 742 (1995); *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

Nevertheless, a union may waive its right to bargain about mandatory subjects. Waivers can occur in any of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practice, bargaining history and action or inaction), or by a combination of the two. *United Technologies Corp.*, 274 NLRB 504, 507 (1985).

Examples of contract provisions the Board has found constituted waivers of a union's right to bargain over decisions but not the effects of the decisions are set forth below.

In *Enloe Medical Center*, supra at 475 the Board found that the management rights provision set forth below did not waive the union's right to bargain over the effects of a new on call policy for nurses.

## ARTICLE 2 MANAGEMENT RIGHTS

Except as otherwise specifically provided in this Agreement, the Employer retains the sole and exclusive right to exercise all the authority, rights and/or functions of management. The Employer expressly retains the complete and exclusive authority, right and power to manage its operations and to direct its Nurses except as the terms of this Agreement specifically limit said authority, rights and powers. These retained authorities, rights and powers include, but are not limited to: Nurses. *The right to select and assign work to Nurses in accordance with requirements as determined by management; to determine the existence, amount or lack of work, to increase or decrease the working forces; to determine the levels of staffing and number of Nurses to be employed in each position; to make and enforce reasonable rules for the maintenance of technical standards, discipline, efficiency or safety; to hire, promote, demote, transfer, layoff and recall Nurses; to assign Nurses to duties and hours of work; to create or discontinue job functions; to determine safety, health and property protection measures; to maintain order and efficiency in the Employer's operations; to discharge, suspend and otherwise discipline employees; to determine the qualifications required, size, composition and distribution of the working force; to supervise and direct Nurses in the performance of their duties; to set standards to insure the proper and efficient use of the working force and equipment; and otherwise to take such action management may determine to be necessary for safe, orderly, and efficient and economical operations.* The Employer retains the sole and exclusive right to establish from time to time and to maintain the reasonable standards of performance required of bargaining unit Nurses. (emphasis added)

In *Allison Corp.*, 330 NLRB 1363, 1365 (2000) the Board found that the following management-rights clause in the parties' contract waived the Union's right to bargain over the decision to subcontract but not the effects:

## SECTION 13. MANAGEMENT RIGHTS

A. The Company has, retains, and shall possess and exercise all management rights, functions, powers, privileges and authority inherent in the Company as owner and operator of the business, excepting only such rights that are specifically and expressly relinquished or restricted by a specific Article or Section of this Agreement.

B. *The Company shall have the exclusive right* to manage the business and operation of its facilities; to schedule and require the performance of overtime work; to discipline or discharge employees for just cause; to adopt, modify or rescind reasonable work rules, quality and production standards and to discipline or discharge employees for violation of such rules and standards; to determine, implement, modify or eliminate techniques, methods, processes, means of production; *to subcontract*; to transfer work or materials from one Company operation to another, as now may exist or as may hereafter be established; to utilize labor saving devices; to determine the location of the business, including the establishment of new facilities and the relocation, closing, selling, merging or liquidating of any facility, department, division or subdivision thereof either permanently or temporarily; and generally to control and direct the Company in all of its operations and affairs. [Emphasis added.]

Likewise in *Kiro Inc.*, 317 NLRB 1325 (1995), the Board found the following management rights clause waived the Union's right to bargain over the decision to produce a news program but did not waive bargaining as to the effects of that decision:

The management of the business and the direction of the work force, *including the right to plan, direct and control station operations; the right to hire, schedule, assign work, retire, demote, suspend, transfer, or discharge*; the right to discipline for just cause; the right to judge the competence and ability of employees; *the right to determine the means, methods, processes and schedules of production*; the right to determine the products to be manufactured or services to be performed; the right to determine whether to make or buy; *the right to determine the location of stations and the continuance of any departments*; the right to establish production standards in order to maintain efficiency of the employees, are rights belonging to the Company and are not subject to the grievance procedure set forth in this Agreement. (Emphasis added)

In *Public Service Co.*, 312 NLRB 459, 460 (1993) the Board found that a subcontracting provision in the parties collective bargaining agreement that dealt only with subcontracting for the purpose of laying off employees, did not constitute a waiver by the union of the employer's decision to subcontract work in all other situations.

In *Reece Corp.*, 294 NLRB 448, 452 (1989) a management rights clause in the collective bargaining agreement gave the employer, "*the right to abandon or discontinue any production, methods or facilities*," and a severance clause noted that employees shall be entitled to a severance allowance, "When in the *sole judgment of the Company*, it decides to *close permanently the plant or discontinue permanently a department of the plant or portion thereof and terminate the employment of individuals*, . . ." Despite these provisions, the Board found that they did not waive the union's right to bargain over the employer's decision to relocate or transfer bargaining unit work, ". . . because we do not find that the language meets the 'clear and unmistakable' standard that governs the waiver of statutory rights."

In the instant case the provision Respondent advances as a waiver by the Union of its right to bargain over the decision to subcontract and its effects states:

#### CONTRACTING WORK:

In case the Company should contract any type of work customarily performed by bargaining unit employees, the Company shall, before awarding such contract, advise the contractor that the work is to be done under not less than the terms

and conditions pertaining to hours and wages set forth in this Agreement. Upon award of such contract, the Company shall notify the Union in writing within thirty (30) days of any and all contracts awarded of such contractor and the nature of the work being performed.

5 In each of the above cited examples where the Board found a waiver, there was an explicit, unequivocal waiver by the union of a right to bargain over a specific subject. Where the contract was either silent or unclear concerning the right to bargain over decisions or effects regarding mandatory subjects, the Board found no waiver. While in the instant case, it could be inferred  
10 from the contract language that the Union waived its right to bargain over the decision to subcontract, inference is not sufficient to satisfy the Board's strict standard that the specific contract language must demonstrate a "clear and unmistakable" expression of the Union's intent to waive its right to bargain over a mandatory subject.

15 Nothing in this contract provision specifically states that the Union is waiving its right to bargain over the decision to subcontract unit work. There is no clear and unmistakable waiver and Respondent has proffered no evidence that the parties have ever fully discussed the issue of the Union's waiver of the right to bargain over Respondent's decision to subcontract bargaining unit work. The article appears only to obligate Respondent, should it desire to  
20 contract out work, to notify contractors of their responsibilities to pay contract wages and to notify the Union when contracts have been awarded. This language lacks the specificity shown in prior Board decisions finding waiver of the right to bargain over decisions and effects. Moreover, there is an absolute lack of showing from the contract language itself that this contract provision waived the Union's right to bargain over the effects of contracting out  
25 bargaining unit work.

Having found that the Union did not waive its right to bargain over the decision or effects of subcontracting out bargaining unit work, and the record showing that the March 27, 2007 request for information was relevant and necessary to the Union's responsibility as collective  
30 bargaining representative, I find that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to respond to the information request.

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following.

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#### Conclusions of Law

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

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3. Respondents violated Section 8(a)(1) and (5) of the Act by:

a. Since November 15, 2006, by delaying in furnishing information to the Union necessary and relevant to its duties as collective bargaining representative of employees in the following unit:

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All employees employed in the customer Service, Energy Services, LGS billing, Districts, Material/Warehousing, Reprographic Services, Mail Room/Receiving Departments, Line, Fleet Services, Meter Services,

Communications, Materials, Generation, Substations, and Survey Organizations, excluding all supervisory, confidential, and professional employees within the meaning of the Act.

5           b. Since March 27, 2007 by failing to provide the Union with information necessary and relevant to its duties as collective bargaining representative of employees in the above unit.

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

10           5. The Respondents did not otherwise violate the Act as alleged in the Second Consolidated Complaint and the remaining complaint allegations will be dismissed.

#### Remedy

15           Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

20           As part of the remedy in this case Counsel for the General Counsel seeks an order requiring Respondent to post a Notice to Employees on its intranet website.

25           For about eight years, Respondent has had a system for electronically communicating with its employees which is now called the “Matrix.” Respondent uses the Matrix for a variety of communications with employees including the price of Respondent’s stock, guest speakers, photos of employees at work, time off and work assignments.

30           In *National Grid USA Service Co.*, 348 NLRB No. 88, fn. 2 (2006) and *Nordstrom, Inc.*, 347 NLRB No. 28 fn. 1 (2006), which involved remedies requiring electronic notice posting, the Board stated that it was open to, “. . . considering the merits of a proposed modification to the standard notice-posting language in a particular case if the General Counsel or a charging party (1) adduces evidence at an unfair labor practice hearing demonstrating that a respondent customarily communicates with its employees electronically, and (2) proposes such a modification to the judge in the unfair labor practice proceeding.”

35           In this case Counsel for the General Counsel adduced evidence that Respondent regularly communicates with its employees via the “Matrix,” an intranet website, and made the request for such modification of the notice posting during the unfair labor practice proceedings.

40           Having fulfilled the Board’s requirements for modification of the notice posting, I will recommend Respondent post the attached Notice to Employees on its Matrix intranet website.

45           As part of the Remedy herein Respondent seeks damages in the form of attorney’s fees and expenses incurred in connection with its defense of the Complaint alleging violations of the Act regarding the failure to provide information in conjunction with the Porter grievance.

50           Section 102.143 of the Board’s Rules and Regulations provides for awards of fees and other expenses for a prevailing party in an adversary adjudication. Section 102.148 of the Board’s Rules and Regulations states that an application for an award of fees and expenses, “. . . may be filed after entry of a final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding but in no case later than 30 days after the entry of the Board’s final order in that

proceeding.” As there is no final order in this case, the time is not ripe for the filing of an application for fees and expenses.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>2</sup>

### ORDER

The Respondent Nevada Power Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to provide or unreasonably delaying in providing information to the International Brotherhood of Electrical Workers, Local Union 396, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designated to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility and on its intranet website copies of the attached notice marked “Appendix.”<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents’ authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 15, 2006.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>2</sup> If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

<sup>3</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

IT IS FURTHER ORDERED that the Second Consolidated Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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Dated, Washington , D.C. March 26, 2008

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John J. McCarrick  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

Accordingly, we give our employees the following assurances:

**WE WILL NOT** do anything that interferes with these rights.

**WE WILL NOT** refuse to furnish information or unreasonably delay in furnishing information requested by the Union that is relevant and necessary to the Union's performance of its duties as your collective bargaining representative.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

NEVADA POWER COMPANY

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Phoenix, Arizona Regional office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1800, Phoenix, Arizona 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

**THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS**

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.